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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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FILED
COURT OF CRIMINAL APPEALS
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In the

Court of Criminal Appeals of Texas

Austin, Texas

STATE OF TEXAS,
Appellant

v.

MARTIN RIVERA LOPEZ,
Appellee

On the State's petition for discretionary review from the
Fourth Court of Appeals, San Antonio, Texas

Appellate Cause No. 04-17-00568-CR

Appealed from a dismissal order in the County Court at Law No. 7
Bexar County, Texas

Trial Cause No. 549327

APPELLEE'S RESPONSE TO STATE'S PETITION FOR DISCRETIONARY REVIEW

Michael Dwight Goains
SBOT# 00793815
P.O. Box 591340
San Antonio, Texas 78259
Telephone: (210) 577-5558
Facsimile: (830) 714-9222

Attorney for Appellee
Martin Rivera Lopez

IDENTITY OF PARTIES AND COUNSEL

Petitioner-Appellant:	The State of Texas Appellant in the Court of Appeals
Counsel for Petitioner-Appellant:	NATHAN E. MOREY Assistant Criminal District Attorney State Bar No. 24074756 Counsel on Appeal and Discretionary Review Email: nathan.morey@bexar.org SAMUEL LYLES Assistant Criminal District Attorney State Bar No. 24102122 Counsel at Trial
Respondent-Appellee:	MARTIN RIVERA LOPEZ Appellee in the Court of Appeals
Counsel for Respondent-Appellee:	Michael Dwight Goains Attorney at Law State Bar No. 00793815 Counsel at Trial, on Appeal, and Discretionary Review Email: goainslaw@gmail.com
Trial Judge:	THE HONORABLE EUGENIA WRIGHT County Court at Law No. 7
Panel of the Fourth Court of Appeals:	THE HONORABLE SANDEE BRYAN MARION, *Chief Justice* THE HONORABLE REBECA MARTINEZ, *Justice* THE HONORABLE LUZ ELENA CHAPA, *Justice* Author of the Opinion

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STATEMENT REGARDING ORAL ARGUMENT

If this Honorable Court of Criminal Appeals accepts this case for review Appellee respectfully requests Oral Argument in this matter.

STATEMENT OF THE CASE

The Honorable Trial Court in this matter dismissed the information filed against the Appellee by the State of Texas for the failure of the State and the Trial Court to provide Appellee a Speedy Trial as guaranteed by the Sixth and Fourteenth Amendments of the United State Constitution. The State appealed the matter and the Honorable Fourth Court of Appeals affirmed the findings of the Trial Court. The State of Texas then requested a rehearing in which the Court of Appeals amended its findings and again affirmed the Trial Court.

STATEMENT OF THE PROCEDURAL HISTORY

Appellee was initially arrested on or about April 18, 2017 and held pursuant to a felony complaint for Bodily Injury to an Elderly Person pursuant to Texas Penal Code sec. 22.04(a). The felony complaint was filed as NM 341783 in the 144th District Court of Bexar County, Texas and Trial Counsel was appointed on May 12, 2017. Pre-Indictment hearings were held on June 21 and July 07, 2017 in the 144th District Court. At a third hearing scheduled for July 12, 2017 Appellee's Trial Counsel was notified by the 144th that the matter had been dismissed and would be refiled as a misdemeanor in County Court at Law No. 7 of Bexar County, Texas. On or about July 20, 2017, in front of a visiting Judge, Appellee's Trial Counsel requested that the Appellee be released from confinement pursuant to Article 17.151(1)(2) of the Texas Code of Criminal procedure for being held in custody for more than 30 days without the State of Texas making an announcement of ready. The request was denied.

The Trial Court informed the Appellee that he would remain in custody and that he would be notified of the date of the next hearing. Appellee's Trial Counsel stopped by the County Court at Law on August 8, 2017 to file Appellee's Motion for Speedy Trial and determine the status of the next hearing date. Upon approaching the Court Coordinator, Trial

Counsel was informed for the first time that the Appellee was present, and the State of Texas approached the bench and announced ready trial. Neither the Appellee nor his Trial Counsel was informed of the Trial Setting. Trial Counsel filed the Motion for Speedy Trial which was granted. It is undisputed that the State of Texas filed a timely notice of appeal. The Court of Appeals affirmed the decisions of the Trial Court. On November 30th the State of Texas filed its Amended Petition for Discretionary Review in this matter. Appellee respectfully requests that this Honorable Court of Criminal Appeals deny the Petition for Discretionary Review filed by the State of Texas in this matter.

APPELLEE'S ARGUMENT AGAINST APPELLANT'S REQUEST OF DISCRETIONARY REVIEW

The Court of Appeals did not err when it affirmed the Trial Court's dismissal the underlying trial cause of action based on the State's and Trial Court's failure to provide Appellee with a Speedy Trial in accordance with Sixth and Fourteenth Amendments of the United States Constitution

SUMMARY OF ARGUMENT

The Sixth Amendment of the United States Constitution requires the State of Texas to provide the Appellee with a Speedy Trial and such right to Speedy Trial is considered a fundamental right under the 14th Amendment. In the matter at hand the State of Texas denied the Appellee the Right to a Speedy Trial when Felony Prosecutors failed to indict the Appellee after 85 days of confinement and instead dismissed the felony charges against him, regardless of the reason. The Felony Prosecutors did not allow for the release of the Appellee from custody but had him illegally held for an additional day until they could prepare a warrant for arrest of the Appellee for a misdemeanor charge based on the same set of circumstances as the felony accusation. At the time of the second arrest Appellee had already served 85 days in custody without the announcement of ready by the State of Texas. Appellee should have been immediately released from custody pursuant to Article 17.151(1)(2) of the Texas Code of Criminal Procedure.

Instead his Trial Counsel had to insist that he be allowed to appear in Court on July 20, 2017 to argue this point. The Visiting Judge for County Court at Law No. 7 clearly violated the Appellee rights pursuant to Article 17.151 by not allowing for his bonding at that time. I want to make it perfectly clear that the Misdemeanor Prosecutors in County Court at Law No. 7 did not try in any manner to obstruct the request for bond. The Prosecutors did request some conditions to the bond, such as GPS tracking, but in no way attempted to stop the Appellee from his right to a bond pursuant to Article 17.151(1)(2). The decision to deny the bond was solely made by the Visiting Judge to the Court.

Finally, on August 8, 2017, Appellee's Trial Counsel was notified that his client was available in the Court without any prior notice of any type of hearing. When Trial Counsel entered the Court Room and approached the Coordinator, the State of Texas approached the bench and announced ready for trial. Neither the Appellee nor his Trial Counsel had any notice of a Trial Setting on that date and such notice cannot be shown anywhere in the record. Counsel is not attempting to raise any type of conspiracy that the State and/or the Court purposely denied him any notice. The situation at hand and the complexity of the matter, with no proceeding legal arguments led to that result. Appellee immediately filed his Request for Speedy Trial,

which he had planned on filing on that date. The Trial Court did not Err in the granting of the motion and dismissal of the misdemeanor cause of action because a Speedy Trial was denied to the Appellee because the Felony Prosecutors for the State of Texas took affirmative steps to deny the Appellee his release after the dismissal of the felony charges, and the Visiting Judge's refusal to allow a bond for the Appellee that was required pursuant to Article 17.151 (1)(2) of the Texas Code of Criminal Procedure. Because of these violations of the Appellee's rights pursuant to Texas Law, Appellee did not receive the "orderly expedition" of his trial as guaranteed by the Sixth Amendment to the United States Constitution. Therefore, the Trial Court did not Err when it Dismissed the proceedings in this matter and the Fourth Court of Appeals properly affirmed the Trial Court's decision.

ARGUMENT

The Court of Appeals did not err when it affirmed the Trial Court's dismissal of the underlying trial cause of action in this matter based on the State's and Trial Court's failure to provide Appellee with a Speedy Trial in accordance with the Sixth and Fourteenth Amendments of the United States Constitution.

The Appellee is guaranteed a right to a Speedy Trial and such right is

a fundamental right under the Sixth Amendment of the United States Constitution. U.S. Constitution Amend. VI; Klopfer v. North Carolina, 386 U.S. 213, 233 (1967). This right of a Speedy Trial is relative based on the circumstances of the accused, consistent with certain delays, and does not preclude the rights of the public. Beavers v. Haubert, 198 U.S. 77, 87 (1905). This guarantee to a Speedy Trial is not based on mere speed, it requires an "orderly expedition" of trial proceedings. State v. Munoz, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999). Courts must examine four (4) factors to determine whether the Appellee's right to a Speedy Trial has been violated:

1. The Length of the Delay;
2. The Reason for the Delay;
3. The Defendant's Assertion the Right; and
4. The Prejudice to the Defendant.

Barker v. Wingo, 407 U.S. 514, 530 (1972).

Length of the Delay

Appellee fully believes that this was a case of first impression that was Affirmed by the Honorable Court of Appeals. The length of the delay is calculated from the date of the arrest or indictment, whichever is first. Harris v. State, 827 S.W.2d 949, 956 (Tex. Crim. App. 1992). The Court of

Criminal Appeals has determined that a delay of eight months or longer is "presumptively unreasonable" and should trigger the analysis of the remaining factors. Zamorano v. State, 84 S.W.3d 643, 649 (Tex. Crim. App.2002). However, that is only "presumptively unreasonable," as stated by the United States Supreme Court the right is relative based on the circumstances of the accused. Beavers at 87. The Court of Criminal Appeals also states that the right is not based on mere speed but on an "orderly expedition" of trial proceeding. Munoz at 821. The arguments presented by the State of Texas in this matter are not consistent with the circumstances of Appellee. The statement by the Court of Criminal Appeals that a delay of eight months or longer is "presumptively unreasonable" is based on a misdemeanor DWI charge that had been pending for more than four (4) years, but the Defendant had been released on bail. Zamorano at 644. In Zamorano the Court cited Harris which involved charges of Capital Murder. Harris at 827. The Court of Criminal Appeals also states that this factor will "weigh against the State" when the length of the delay stretches well beyond the bare minimum needed to trigger a full Barker analysis, in a case which involved the felony charge of Indecency with a Child. Gonzales v. State, 435 S.W.3d 801, 809 (Tex. Crim. App. 2014).

Appellee understands that the only case with a comparable Length of

Delay is an unpublished opinion issued by the El Paso Court of Appeals. State v. Webster, No. 08-16-00105-CR. Appellee agrees that the Court found that a four (4) month delay in that case was too short to trigger the Barker analysis. Id. at 5-8. However, once again Webster involved a Felony possession of cocaine and not a misdemeanor. Id. at 3.

In the Appellee's cause of action, a delay of 112 days during which he was denied his right to a Bond pursuant to the Texas Rules of Criminal Procedure is not an "orderly expedition" of this trial proceedings and therefore requires the Court to continue into the remaining factors of the Barker analysis.

Reason for the Delay

Appellee understands that Courts will assign weight to this factor based on the conduct of the parties. Hopper v. State, 520 S.W.3d 915, 924 (Tex. Crim. App. 2017). The reason for the delay will weigh heavily against the State if it makes a deliberate attempt to delay a trial. Gonzales at 809-810. Further, a Defendant's actions to delay the trial will be weighed against the Defendant. Vermont v. Brillon, 556 U.S. 81, 90 (2009). In the Appellee's cause of action, the Appellee has done nothing to delay the trial of this matter. It is also clear that the Felony Assistant District Attorneys purposely delayed the trial in this matter by waiting until the 85th day

following Appellee's arrest to dismiss the felony charges against him instead of making a proper early determination and allowing the County Court at Law to conduct an orderly expedition into the trial of this matter. Any and all delays lie with the Felony Prosecutors for the State of Texas. The State of Texas did not conduct an "orderly expedition" when they allowed 85 days to elapse before determining that the accusations against the Appellee did not rise to the level of felony charges but should be handled as a misdemeanor. The Felony Prosecutors caused further delays and extended incarceration when they refused to allow his release following the dismissal of felony charges and instead ensured that Appellee was retained by the Bexar County Jail until a warrant could be issued for the alleged misdemeanor charges.

Assertion of the Right

Appellee understand that it is his responsibility to assert his Right to a Speedy Trial. Hopper at 924. However, even a failure by an accused to assert the Right to a Speedy Trial does not waive that right. Barker at 532. In this case the Appellee did assert his right to a Speedy Trial. He was preparing to file the Request when without notice of any type of hearing the State begin announcing ready for trial. Appellee immediately filed his

request and it was granted by the Court. The State cannot show any type of document that the Appellee was ever notified that any type of setting had been scheduled for August 8, 2017.

Prejudice to the Defendant

To determine prejudice to the Appellee the Court of Appeals must take into consideration any oppressive pretrial incarceration, anxiety and concern of the Appellee, and whether the Appellee's defense has been impaired by the delay. Cantu v. State, 253 S.W.3d 273, 282 (Tex. Crim. App. 2008). The Appellee has the burden of establishing prejudice. Munoz at 826. In the Appellee's cause of action he did establish prejudice. First, the pretrial incarceration of the Appellee was oppressive as it was extended by the Felony Prosecutors for the State of Texas without a warrant for a period of at least 24 hours following the dismissal an any Felony Charges against the Appellee pursuant to NM 341783 before the 144th District Court of Bexar County, Texas. Further, the Felony Prosecutors for the State of Texas failed to properly determine whether or not the accusations against the Appellee properly belonged before a District Court with Felony Jurisdiction and waited 85 days to dismiss the Felony Charges. Even at that time, without any calculation for good time credit as calculated by the Bexar County Jail, the Appellee would already have served nearly one-fourth (1/4) of the

maximum punishment for any misdemeanor he may have committed. Even with that amount time in custody, the Felony Prosecutors did everything they could to ensure that the Appellee would not have been released upon dismissal of the Felony Charges.

Secondly, the actions of the Felony Prosecutors and the Visiting Judge, assigned to County Court at Law No. 7 on July 20, 2017, created anxiety and concern for the Appellee that his rights pursuant to Texas Law would not be respected. The Visiting Judge in this matter directly violated the Appellee's rights in accordance with Texas Law based on Article 17.151 (1)(2) of the Texas Code of Criminal Procedure. The Appellee had clearly been held for more than 30 days and the State of Texas was not ready for trial in the matter. These actions by the Felony Prosecutors and the Visiting Judge clearly created anxiety and concern for the Appellee in that he did not believe that his rights would ever be respected.

Examination of the Barker Factors

Once again, the Court of Court Appeals examined four (4) factors to determine whether or not the Appellee was granted a Speedy Trial in this matter in accordance with the Sixth and Fourteenth Amendments of the United States Constitution. The Factors are as follows:

1. The Length of the Delay;

2. The Reason for the Delay;

3. The Defendant's Assertion the Right; and

4. The Prejudice to the Defendant.

Barker at 530.

As to the Length of Delay, neither the State of Texas nor the Appellee can find any precedence where a Defendant was held for 112 days, in based on a misdemeanor charge, without being granted a bond or facing a public trial. Appellee agrees that in most cases, where a defendant has been indicted of a felony offense or has been released on bond and facing misdemeanor charges, a delay of trial of more than eight (8) months is "presumptively unreasonable" and triggers the analysis of the remaining factors. Zamorano at 649. However, each case must be looked upon individually to determine whether an "orderly expedition" into the trial process has been demonstrated and not merely how long it took for a jury trial to take place. Munoz at 821. In this matter, an "orderly expedition" into the trial process was not conducted for the Appellee. The Appellee was incarcerated for the entire period of time, approximately 112 days, from the initial accusations against the Appellee until the granting of his request for a Speedy Trial.

Having, a Defendant serve nearly one-third (1/3) of this maximum range of punishment in the Bexar County Jail, prior to any type of trial initiation should not be considered an "orderly expedition" in the trial process.

As to the Reason for any Delay's, no one can establish that the Appellee took any actions that would have delayed a trial in this matter. Any and all delays lie with the Felony Prosecutors for the State of Texas. The State of Texas did not conduct an "orderly expedition" when they allowed 85 days to elapse before determining that the accusations against the Appellee did not rise to the level of felony charges but should be handled as a misdemeanor. The Felony Prosecutors caused further delays and extended incarceration when they refused to allow his release following the dismissal of felony charges and instead ensured that Appellee was retained by the Bexar County Jail until a warrant could be issued for the alleged misdemeanor charges.

Further, the Appellee did assert his right to a Speedy Trial in this matter. The State of Texas can show that they did announce "Ready for Trial" prior to the filing of the Appellee's Request for a Speedy Trial. However, the State of Texas can only make such a showing because neither the Appellee nor his Attorney was notified of a Trial Setting on August 8,

2017. The State of Texas cannot produce as single document that the Appellee or his Trial Counsel were notified of the Trial Setting or any other type of setting on that date. Further, any failure of the Appellee to assert such right, does not waive his right to a Speedy Trial. Barker at 532. Such failure would only be weighed against the Appellee in the examination of the Barker factors.

Finally, the Prejudice to the Defendant due to the failure of the State to proceed with a Speedy Trial. Once again, in this Cause of Action the Appellee demonstrated that he was prejudiced by the State's failure to grant him a Speedy Trial in this matter. Appellee believes that it clear than his pretrial incarceration was oppressive and was needlessly extended by the Felony Prosecutors in this matter. Further, as stated above, the actions of the Felony Prosecutors and the Visiting Judge, assigned to County Court at Law No. 7 on July 20, 2017, created anxiety and concern for the Appellee that his rights pursuant to Texas Law would not be respected.

CONCLUSION

Appellee believes that a proper examination of the Barker factors can only lead this Honorable Court of Criminal Appeals to deny the Petition for Discretionary Review filed by the State of Texas in this matter. This is based on the failure of the State of Texas to conduct an "orderly expedition"

through the Appellee's trial process, therefore denying him of his right to a Speedy Trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution. Based on the arguments of the State of Texas a misdemeanor Defendant could be held for eight months without a Trial Setting without any recourse in the matter. In Bexar County, Texas based on the current policies of the Bexar County Sheriff's Office, such Defendant would have satisfied the maximum range of punishment for a Class A misdemeanor, two months prior to his right to request a dismissal based on a Speedy Trial violation.

PRAYER

WHEREFORE, Appellant respectfully requests that this Honorable Court of Criminal Appeals deny the Petition for Discretionary Review affirming the findings of the Fourth Court of Appeals and Bexar County Court at Law No. 7.

Respectfully submitted,

Michael Dwight Goains
SBOT# 00793815
P.O. Box 591340
San Antonio, Texas 78259
Telephone: (210) 577-5558
Facsimile: (830) 714-9222

Attorney for Appellee
Martin Rivera Lopez

CERTIFICATE OF COMPLIANCE

I certify that this document brief/petition was prepared with Microsoft Word 2012, and that, according to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 4010 words.

CERTIFICATE OF SERVICE

I, Michael D. Goains certify that a complete true and correct copy of the above was served on the Bexar County District Attorney's Office by:

_____ Certified Mail, Return Receipt Requested, Certificate Number _____, at the following address:

_____ Facsimile Transmission to: _____

_____ Personal Service.

XXXXX Email to District Attorney's Office at ricov@bexar.org and nathan.morey@bexar.org.

Signed on this the 17th day of December, 2018.

Michael D. Goains
Attorney for Appellant